No. 83-320

In the Supreme Court of the United States

OCTOBER TERM, 1983

ANDERSON COUNTY, TENNESSEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

MICHAEL L. PAUP
JONATHAN S. COHEN
JOHN J. MCCARTHY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that the district court erred in dismissing the government's complaint on the basis of the abstention doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A13) is reported at 705 F.2d 184. The opinion of the district court (Pet. App. A1-A3) is reported at 547 F. Supp. 18.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1983. A petition for rehearing was denied on June 10, 1983 (Pet. App. A14). The petition for a writ of certiorari was filed on August 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States owns in fee simple the Oak Ridge Reservation, consisting of 37,000 acres of land in Tennessee. It is the site of major federal atomic energy facilities, devoted principally to development of nuclear energy and production of nuclear weapons for national defense (Pet.

App. A5). Among these facilities is the Y-12 Plant, located on the Reservation within the boundaries of petitioner Anderson County. The Y-12 Plant, like the other facilities on the Reservation, is managed for the United States by Union Carbide Corporation under a standard management contract developed by the Atomic Energy Commission. (*Ibid.*) This contract, which is renegotiated periodically, provides Union Carbide a fixed annual fee (plus costs) for managing and maintaining the federal facility. The fee is unrelated to the value of the property managed and to the output of weapons at the Y-12 Plant.

All real and personal property used in the operation of the Y-12 Plant, including inventories, work-in-process, and finished goods, is owned by the United States (C.A. App. 19). Title to the land on which the Plant is located, to the buildings that comprise it, and to the equipment and supplies used in it, is in the name of the United States (C.A. App. 20). All costs of operating the Plant, including the costs of materials and supplies procured by Union Carbide as procurement agent, are liabilities of the United States (Pet. App. A5; C.A. App. 19). Union Carbide advances no funds and commits no property of its own to management of the Plant (Pet. App. A5). Absent willful misconduct or the like, Union Carbide is not liable for damage to or loss of any property at the Plant (Pet. App. A5; C.A. App. 20).

Union Carbide performs no work as a private entrepreneur at the Y-12 Plant, either on its own behalf or on behalf of anyone else (Pet. App. A5). Union Carbide has no right to use Plant property in its own business, but merely a right of access to perform, under the direction of the United States, the duties stipulated in its management contract (*ibid.*). Union Carbide is not obligated to pay rent or other consideration in exchange for its presence at, or its right of access to, the Plant (*ibid.*). The management contract can be terminated at any time at the option of the United States

(C.A. App. 5-6). Union Carbide has managed the Plant, under substantially identical contract terms, since 1943 (Pet. App. A56).

In March 1980, petitioner Anderson County determined that Union Carbide was the owner of a "real property interest" in the Y-12 Plant and proposed to assess an ad valorem tax against that alleged interest (Pet. App. A6). Union Carbide contested the proposed assessment before the Anderson County Board of Equalization; when that challenge proved unsuccessful, appeals followed to the Assessment Appeals Committee and the State Board of Equalization (Pet. App. A6).[1] In January 1982, the State Board of Equalization upheld petitioner's assessment, concluding that Union Carbide was the owner of a "real property interest" under Tennessee law; that Union Carbide's property interest was not exempt from tax under Tennessee law as "property of the United States * * * used exclusively for public * * * purposes', and that, in view of Union Carbide's status as an independent contractor, the levy was not unconstitutional as a tax against the United States (Pet. App. A7). The value of Union Carbide's "real property interest" was found to be $325 million, or $50 million more than the depreciated book value of the Y-12 Plant as carried on the United States' books (Pet. App. A54, A58). This assessment would subject Union Carbide to an annual real property tax of over $3 million, or $1 million more than its annual fee for managing the Plant (C.A. App. 19).

2. On February 12, 1982, the United States, which under the management contract is obligated to pay all costs incurred in operating the Y-12 Plant, brought this action in

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[1]The United States, in order to preserve its claim of sovereign immunity, refused to submit to the jurisdiction of these state and local tax authorities, and accordingly did not join in Union Carbide's petition for administrative review (Pet. App. A6).

the United States District Court for the Eastern District of Tennessee, challenging the legality of petitioner's proposed tax on Union Carbide. The complaint sought a declaration that the management contract did not create any real property interest in, or convey any real property interest to, Union Carbide, and that petitioner's proposed levy was unconstitutional because it represented an attempt to tax property owned by the United States. Pet. App. A7, A51. The district court dismissed the complaint, holding that it was required to abstain under the doctrines of *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941), and *Younger* v. *Harris*, 401 U.S. 37 (1971) (Pet. App. A2). The court noted that Union Carbide in March 1982 had filed in Tennessee chancery court a petition for review of the proposed assessment, challenging its validity and amount on various state-law grounds (*ibid.*). The court held that these pending state proceedings mandated abstention on its part, lest it "be required to make a constitutional determination based on speculative interpretation of state law" (*id.* at A3).[2]

The court of appeals unanimously reversed. It held that abstention under the *Pullman* doctrine was inappropriate because Tennessee's tax statutes were "not ambiguous" and because "the most important questions of law presented by the suit" — both "the threshold issue," involving interpretation of Union Carbide's rights under the management contract, and "the ultimate constitutional challenge" to Tennessee's tax — were "federal, not state, questions." Pet.

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[2]In February 1983, the chancery court ruled adversely to Union Carbide, holding that it had a "real property interest" in the Y-12 Plant under Tennessee law by virtue of its management contract; that such property interest was not tax-exempt as "dedicated to a public purpose"; and that the State Board of Equalization had correctly computed the amount of the tax (Pet. App. A74-A81). Union Carbide has appealed that decision to the Tennessee Court of Appeals, where the case is now pending.

App. A10-A11. The Sixth Circuit assumed arguendo that the *Younger* doctrine extended to chancery court proceedings of the sort involved here (*id.* at A11). It noted, however, that the doctrine applies only when "important state interests are involved," and it held that Tennessee's interest in administering its tax system without interference was "at best concurrent with and at worst totally subservient to the coexisting interest of the United States" in obtaining a federal-court determination of its constitutional immunity from Tennessee's tax. *Id.* at A11-A13, citing *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).[3]

ARGUMENT

The court of appeals properly applied the doctrine of abstention to the facts of this case. Petitioner does not allege (nor is there) a conflict among the circuits on the question presented.[4] There is no basis for review by this Court.

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[3]The court of appeals denied petitioner's motion for a stay of mandate (Pet. App. A15) and remanded the case to the district court for decision on the merits (*id.* at A13). On November 8, 1983, the district court awarded summary judgment in favor of the government. (The opinion on remand, which is not officially reported, is reprinted at App. 1a-8a, *infra*.) The district court held (App. 6a-8a, *infra*) that the management contract gave Union Carbide no more than a license to perform services on government-owned property and created in Union Carbide no estate in land capable of being subjected to Tennessee's real property tax; the district court accordingly found it unnecessary (*id.* at 8a) to reach the constitutional question. Although the decision on remand does not render moot petitioner's challenge to the court of appeals' holding that there should be no abstention, it is an additional consideration counselling against this Court's review of the abstention issue, considered in isolation, at this stage of the proceeding.

[4]Petitioner does allege (Pet. 26) that the Sixth Circuit's decision here conflicts with its previous decision in *United States* v. *Ohio*, 614 F.2d 101 (1979). But the panel below (Pet. App. A8-A10) carefully distinguished that earlier decision, and petitioner's request for rehearing, which alleged an intracircuit conflict, was denied. Pet. App. A14.

1. This Court has repeatedly held that "[t]he doctrine of abstention * * * is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, No. 81-1203 (Feb. 23, 1983), slip op. 11-12 (citing cases). The " 'pendency of an action in the state court is no bar to proceedings concerning the same matter' " in a federal forum, and the federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976), quoting *McClellan* v. *Carland*, 217 U.S. 268, 282 (1910). Abstention "can be justified * * * only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Moses H. Cone Memorial Hospital*, slip op. 11-12, quoting *Colorado River*, 424 U.S. at 813.

2. Abstention under the *Pullman* doctrine is appropriate in cases involving threshold and unsettled issues of state law, where " 'a federal constitutional issue * * * might be mooted or presented in a different posture' " by a state court adjudication. *Colorado River*, 424 U.S. at 814, quoting *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 189 (1959). In this case, petitioner contends that Union Carbide acquired a "real property interest" in the Y-12 Plant by virtue of its management contract with the United States. The United States contends that the contract conveys no property interest of any sort to Union Carbide, and that petitioner's proposed tax is thus of necessity an attempt unconstitutionally to tax federally-owned property. Thus, as the court of appeals put it, "the 'unsettled question' is whether the contractual relationship between Union Carbide and the United States conveyed to Union Carbide *any* real property interest in the Y-12 Plant" (Pet. App. A10; emphasis in original).

This question is exclusively one of federal law. It is well settled that the "validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *Allegheny County*, 322 U.S. 174, 183 (1944). Accord, *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1948). It is likewise well established that federal law determines when and to what extent other parties may obtain rights of ownership in federal land. *E.g., Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 669-670 (1979). And it is well established that, in assessing claims of federal immunity from state taxation, a state court's characterization of its tax is immaterial. *E.g., First Agricultural Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 347 (1969). Thus, when a State seeks to levy a real property tax on a federal contractor's alleged interest in a federal facility, the controlling question is whether the contract, as a matter of federal law, gives rise to a property interest on the contractor's part separate and distinct from that held by the United Sates. See *United States* v. *Colorado*, 627 F.2d 217, 219 (10th Cir. 1980), aff'd on appeal, 450 U.S. 901 (1981).

In short, the threshold and paramount issue in this case is a federal question involving construction of the federal management contract. There are no ambiguous state statutes and no unsettled questions of state law whose interpretation or resolution could affect either this threshold issue or the ultimate constitutional decision. The court of appeals

thus correctly determined that *Pullman* abstention was inappropriate here.[5]

3. Abstention under the *Younger* doctrine is appropriate where "federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings." *Colorado River*, 424 U.S. at 816. The doctrine has been expanded to prevent interference with various state judicial proceedings of a quasi-criminal nature. *E.g., Middlesex County Ethics Comm.*, 457 U.S. at 437 (attorney disciplinary proceeding); *Moore* v. *Sims*, 442 U.S. 415 (1979) (juvenile custody proceeding); *Juidice* v. *Vail*, 430 U.S. 327 (1977) (contempt proceeding); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975) (nuisance abatement proceeding). The test is whether "important state interests are involved." *Middlesex County Ethics Comm.*, 457 U.S. at 432.

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[5]Petitioner contends (Pet. 15) that the Tennessee courts might interpret the State's real property tax to reach only freehold and leasehold interests, and thus not to reach interests of the type held by Union Carbide, *regardless* of how the management contract is construed. But the mere possibility that a state court might interpret its tax law in such a way as to moot the whole controversy is not sufficient to warrant *Pullman* abstention in the circumstances presented here. The federal courts have repeatedly decided, without even discussing abstention, challenges brought by the United States to state taxes sought to be levied on federal contractors, even though the state tax had never been construed by the state courts, could fairly be labeled ambiguous, or was susceptible of a construction that would have exempted federal activities from the levy. See, *e.g., Washington* v. *United States*, No. 81-969 (Mar. 29, 1983), slip op. 3; *United States* v. *New Mexico*, 455 U.S. 720, 728 & n.9 (1982); *United States* v. *Colorado*, 460 F. Supp. 1184, 1187 (D. Colo. 1978), aff'd, 627 F.2d 217, 219 (10th Cir. 1980), aff'd on appeal, 450 U.S. 901 (1981); *United States* v. *California State Board of Equalization*, 683 F.2d 316 (9th Cir. 1982). Where state tax authorities have interposed abstention objections, the federal courts have typically rejected them, except where the controlling issue is *exclusively* one of state law. Compare, *e.g., United States* v. *Nevada Tax Comm'n*, 439 F.2d 435, 439 (9th Cir. 1971) (rejecting *Pullman* abstention), and *United States* v. *New Mexico*, 291 F.2d 677, 679-680 (10th Cir. 1961) (same), with *United States* v. *Ohio*, 614 F.2d 101 (6th Cir. 1979) (finding abstention proper where sole issue involved construction of Ohio law).

As the court of appeals intimated (Pet. App. A11), there is considerable doubt whether the *Younger* doctrine could properly be extended to chancery court proceedings of the sort involved here. Those proceedings do not "bear a close relationship to proceedings criminal in nature," nor do they involve "the functioning of the state judicial system." *Middlesex County Ethics Comm.*, 457 U.S. at 432. Moreover, the premise of *Younger* abstention — that the federal plaintiff's federal claims can be fully and fairly adjudicated in the pending state proceeding —is wholly missing where (as here) the federal plaintiff is not even a party to the state-court action. There is no precedent for interpreting *Younger* to require that a federal plaintiff *intervene* in a state-court suit in which it is not involved. And to establish any such rule against the United States would be particularly unsound.

In any event, even if we assume arguendo that the *Younger* doctrine could be extended to cases of this type, the court of appeals properly held (Pet. App. A11-A13) that abstention was inappropriate here. It is of course true that Tennessee generally has an "important interest" in administering its tax laws without federal interference. This interest is codified in 28 U.S.C. 1341, which prevents federal courts from restraining the assessment or collection of state taxes "where a plain, speedy, and efficient remedy" is available in a state forum. This Court has consistently held, however, that Section 1341 is "inapplicable to suits brought by the United States 'to protect itself and its instrumentalities from unconstitutional state exactions.' " *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470 (1976), quoting *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966). See, *e.g.*, *United States* v. *New Mexico*, 455 U.S. at 728-729. The court of appeals was thus correct in concluding that where suit is brought, as here, by the United States, a State's interest in making unfettered tax

assessments is not sufficiently important to warrant abstention on *Younger* grounds.[6]

4. Abstention under the doctrine of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), is appropriate where "there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River*, 424 U.S. at 814. The principal question in this case, however, involves construction of the federal contract; contrary to petitioner's contention (Pet. 18), a declaration "that rights do, or do not, exist under the contract" does not "require an interpretation of state property laws." It is true that the district court, having decided this threshold federal question, would then need to determine whether Union Carbide's property interest (if any) was a real property interest, rather than some other kind of property interest, within the meaning of the Tennessee statute. But this is plainly not the sort of complex and multifaceted administrative and policy question that the *Burford* doctrine contemplates. Indeed, the federal courts here will not undertake (Pet. 18) to "define[] the nature of 'real property' "for Tennessee tax purposes generally, but will do so only in the limited context of a tax sought to be imposed on a federal contractor at a federal facility.

5. Finally, there is no basis for petitioner's contention (Pet. 25-29) that abstention is justified by the need to avoid "piecemeal litigation" under the *Colorado River* doctrine. See 424 U.S. at 818-820. "By far the most important factor

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[6]Petitioner's reliance (Pet. 24) on *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943), in support of *Younger* abstention is misplaced. That case involved a declaratory-judgment action by a corporation, and the Court rested its decision on the statutory predecessor of 28 U.S.C. 1341.

in [the Court's] decision to approve the dismissal in [*Colorado River*] was the 'clear federal policy * * * [of] avoidance of piecemeal adjudication of water rights in a river system,' " a policy that was evidenced by a federal statute. *Moses H. Cone Memorial Hospital*, slip op. 13, quoting *Colorado River*, 424 U.S. at 819. No analogous federal statute or policy is present here. Indeed, the only federal statute favoring state-court adjudication of state tax disputes — 28 U.S.C. 1341 — is inapplicable to suits brought by the United States. See p. 9, *supra*. In any event, Union Carbide's state-court suit is not duplicative of the government's federal one. The former action raises mainly state-law issues of property valuation, tax computation, and statutory construction, issues that are relevant only if the tax is ultimately sustained.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

MICHAEL L. PAUP
JONATHAN S. COHEN
JOHN J. McCARTHY
Attorneys

NOVEMBER 1983

DOJ-1983-11

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

UNITED STATES OF AMERICA	:	
	:	
V.	:	CIV. 3-82-83
	:	
ANDERSON COUNTY, TENNESSEE, ET AL.	:	
	:	

[Filed November 8, 1983]

MEMORANDUM

The United States brought this action seeking a declaration that a state property tax imposed upon a government contractor is invalid. The case is now before the Court on cross motions for summary judgment.

The United States owns in fee simple approximately 811 acres and 300 buildings and structures in Anderson County, Tennessee. This property is known as the Y-12 Plant which is a part of an integrated system of federally owned laboratories and plants operated by the United States Department of Energy [DOE] to develop and produce nuclear weapons for national defense. Union Carbide runs Y-12 for DOE pursuant to Government Contract No. W-7405-ENG-26 [Contract]. Defendants contend that the Contract gave Union Carbide a real property interest as defined by Tenn. Code Ann. § 67-601(1) to which a real property tax attached pursuant to Tenn. Code Ann. § 67-602.

Tennessee Code Annotated § 67-601(1) defines real property "to include lands, tenements, hereditaments, structures, improvements; moveable property assessable under

§ 67-612; or machinery and equipment affixed to realty (except or otherwise provided for herein) and all rights thereto and interests therein, equitable as well as legal." Section 67-602 provides:

> The function of assessment shall be as follows, to wit:
>
> . . . .
>
> (6) All mineral interests and all other interests of whatsoever character, not defined as products of the soil, in real property, including the interest which the lessee may have in and to the improvements erected upon land where the fee, reversion, or remainder therein is exempt to the owner, and which said interest or interests is or are owned separate from the general freehold, shall be assessed to the owner thereof, separately from the other interests in such real estate, which other interests shall be assessed to the owner thereof, all of which shall be assessed as real property.

The Court understands these Tennessee statutes to mean that Tennessee intends to tax *any* interest in real property. *See United States v. Anderson County, Tennessee*, 705 F.2d 184, 187 (6th Cir. 1983).

Although Tennessee law defines real property, whether the Contract conveyed any real property to Union Carbide is a question of federal law. 705 F.2d at 187, *citing United States v. Allegheny County*, 322 U.S. 174 (1977). The questions before the Court are: 1) whether the Contract conveyed to Union Carbide any real property interest in the Y-12 facility, and if so, 2) whether the Supremacy Clause of the United States Constitution prohibits Tennessee from imposing a property tax on Union Carbide.

Pursuant to a series of continual contracts, Union Carbide has run Y-12 for the federal government since 1947. The last contract defining this relationship was scheduled to

expire on September 30, 1983. Union Carbide did not renew the Contract but the parties have extended the Contract to April 1, 1984.

The stated purpose of the Contract is for Union Carbide to manage and operate Y-12. For its services, Union Carbide receives an annual fixed fee plus costs. The fee is unrelated to the value of Y-12. The Contract does not expressly convey to Union Carbide a lease, easement, license, privilege, franchise or any property interest in Y-12. The Contract provides that title to all property in the care and custody or possession of Union Carbide in connection with the Contract will remain vested with the government. Union Carbide is required to reasonably care for all government property under its control at Y-12. The Contract calls for Union Carbide to maintain guard and fire-fighting forces at Y-12. Union Carbide, however, is not liable for loss or damage to government property unless such loss or damage is the result of willful misconduct, bad faith or failure to reasonably comply with DOE directives.

The cost of operating Y-12 is borne by the United States. Union Carbide uses none of its property or funds to operate Y-12. The Contract calls for the use of "advance funding" in which Union Carbide pays creditors from a government account. *See United States v. New Mexico*, 455 U.S. 720, 725-27 (1982). DOE, however, has retained the right to make direct payments to creditors. Under the advanced funding procedure, title to property purchased by Union Carbide for the operation of Y-12 passes directly from the supplier to the government. *Id.*

Union Carbide performs only government work at Y-12. "Union Carbide performs no work as a private entrepreneur on behalf of itself or any other private entity at the Y-12 Plant." 705 F.2d at 185. With limited exception, all technical data produced at Y-12 becomes the property of

the United States. Union Carbide may reserve the right to use any invention it develops at Y-12 for its own private use, however, the government obtains the patent rights to any invention developed at Y-12.

At the time this litigation began there were 7,109 Union Carbide employees and 90 government employees at Y-12. DOE retains the right to inspect Union Carbide's work at any time and any manner it deems appropriate.

The Contract also provides that DOE may terminate the Contract if Union Carbide defaults in performance or "whenever, but upon not less than six (6) months days [sic] prior written notice to [Union Carbide], for any reason DOE shall determine any such termination is for the best interest of the Government." Contract Art. VIII(a)(1) (the Court assumes that six *months* prior notice is required for termination absent default). Union Carbide may terminate the Contract upon one year's notice. Any termination of the Contract would be without prejudice to any claims that either party would have against the other.

A contract between a corporation and the United States government is to be construed and the rights of the parties are to be determined by the application of the same principles of law applicable to contracts between private individuals. *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 188 (1925). The principles of general contract law apply to government contracts. *Pribe & Sons v. United States*, 332 U.S. 407, 411 (1947). Considered in whole and in part, the Court finds nothing ambiguous or confusing about the rights and obligations of this Contract. In such cases, the contract language itself reveals the intent of the parties, and rules of construction need not be considered. *See, e.g., Pavlik v. Consolidated Coal Co.*, 456 F.2d 378 (6th Cir. 1972). *See generally*, 3 Williston on Contracts § 609 (revised edition, 1936). In determining what interest Union Carbide

may have in Y-12, however, the Court is not bound by the terminology used by the parties to the Contract. Union Carbide and the United States have a history of resisting state taxes levied on Y-12. *See, Carson v. Roane-Andrerson Co.*, 342 U.S. 232 (1952); *United States v. Boyd*, 378 U.S. 39 (1964). It would be clearly unfair to allow Union Carbide to avoid a tax if the United States granted Union Carbide a real property interest, but simply did not label it a real property interest.

A contractor with a similar government contract for the operation of the Rocky Flats Plant has been held not subject to a Colorado property tax. *United States v. Colorado*, 627 F.2d 217 (10th Cir. 1980), *aff'd without opinion sub nom.*, 450 U.S. 901 (1981). In that case, however, Colorado was attempting to tax the contractor for the full value of the property. The federal government clearly retained some real property interest in Rocky Flats. Accordingly, a tax on the full value of the property would be at least a partial tax on the United States. The Tenth Circuit concluded that the substance of the Colorado tax was not to tax the contractor's use of government property, "but to lay an ad volorem general property tax on property owned by the United States." *Id.* at 221. Although the court stated that the contractor was "merely going onto government property where it perform[ed] its management services," *Id.* at 220, the Tenth Circuit was not presented with the question of whether the contract conveyed a real property interest. Therefore, the *Colorado* decision does not resolve this case.

Defendants recognize that the United States retained a real property interest in Y-12. Accordingly, defendants claim they have not sought to tax Union Carbide for the full value of Y-12. Rather, defendants claim they have sought to segregate the real property interest retained by the United States from the interest conveyed to Union Carbide.

There is an action parallel to this case pending in the Tennessee state courts. Union Carbide has appealed a Chancery Court decision holding that Union Carbide owned a taxable property interest in Y-12. *Union Carbide Corp. v. Alexander*, No. 82-431 - III (Davidson County Ch. Feb. 2, 1983). The chancellor correctly determined that Union Carbide had the right to leave and enter and the right to use Y-12. Applying the "bundle of rights" theory of property ownership, the chancellor concluded that Union Carbide did own a property interest in Y-12. The chancellor did not explain, however, why Union Carbide's property interest in Y-12 was a real property interest.

This Court is in agreement with the chancellor when he stated that "[i]t is difficult to apply traditional concepts of property ownership which evolve from a medieval, feudal society to this post-World War II arrangement between the government and a contractor for the manufacture of nuclear weapons." *Id.* at 5. Because the Tennessee tax statutes maintain the distinction between real and personal property, however, this Court must maintain the distinction.

Although Union Carbide has the right to enter, leave and use Y-12, it does not have a leasehold interest in Y-12. Generally, during the existence of a lease, the tenant is the owner of the premises and entitled to exclusive possession. 51 C.J.S. *Landlord and Tenant*, § 202(6). Union Carbide does not have exclusive possession of Y-12. Nowhere in the Contract has DOE given up its right to leave and enter Y-12. Nor has DOE given up its right to use Y-12 for any purpose that does not conflict with Union Carbide's contractual obligations. DOE has retained the right to inspect the Y-12 operation whenever and however it deems appropriate. Although government employees at Y-12 are far outnumbered by Union Carbide employees, the right to inspect is significant. Moreover, because of the nature of nuclear

weapons, it is not unreasonable to expect the government to greatly increase its presence during war, international crisis, or a time when sabotage is experienced or expected. The detailed nature of the contract indicates that DOE retains great control over Union Carbide's operation of Y-12. Union Carbide's management program must be approved by DOE and Union Carbide may not construct, alter or repair any physical structure at Y-12 without DOE permission. The contract does not purport to be a lease "and the control over the business of [Union Carbide] and rights of entry and inspection retained by the owner of the realty are so extensive as to negative any notion that a lease of the realty was intended or effected." *United States v. Taylor's Oak Ridge Corp.*, 89 F. Supp. 28, 30 (E.D. Tenn. 1950).

Admittedly, defendants do not claim that Union Carbide has a leasehold in Y-12. Indeed, defendants never specify what real property interest Union Carbide may have in Y-12. The Court is convinced that Union Carbide's interest is a mere license. "A 'license,' with respect to real estate, is an authority to do a particular act or series of acts on another's land without possessing any estate therein. It is not assignable, and is generally revocable at the will of the licensor." *Barksdale v. Marcum*, 7 Tenn. App. 697, 709, *cert. denied*, (Tenn. 1928) (citation omitted). The Contract in this case provides that "[n]either this contract nor any interest therein nor claim thereunder shall be assigned or transferred by [Union Carbide], except as expressly authorized in writing by DOE." Contract at Art. XXI. Additionally, Union Carbide's right to use Y-12 is revokable at the will of DOE. Although DOE is required to give six months notice before termination of the Contract, a period of notice before revocation is not inconsistent with a license in real property. *See United States v. Hodge*, 89 F. Supp. 25, 26 (E.D. Tenn. 1949).

A license creates no estate in land and generally is not considered an interest in land. 53 C.J.S. Licenses § 79 (1948); 25 Am. Jur. Easements and Licenses § 123 (1966). *But see*, Restatement of Property § 512 & Comment c (1944). The Court has no reason to believe that Tenn. Code Ann. § 67-601(1) was designed to tax anything other than that which is traditionally defined as an interest in real property. The Court, therefore, concludes that within the meaning of Tennessee's real property tax, Union Carbide has no real property interest in Y-12.

Because the Court concludes that Union Carbide has no real property interest in Y-12, it is not necessary to determine whether the Supremacy Clause of the United States prohibits Tennessee from imposing a property tax on Union Carbide. The Court notes, however, that defendants could tax Union Carbide's use of the Y-12 real property. *United States v. County of Fresno*, 429 U.S. 452 (1977). The Court has no reservations concerning a local tax upon Union Carbide. The Court simply does not believe that defendants can tax Union Carbide by way of Tennessee's real property tax since, under Tennessee law, Union Carbide's interest in Y-12 is not a real property interest.

It is therefore ORDERED that plaintiff's motion for summary judgment be, and the same hereby is, granted. It is further ORDERED that defendant's motion for summary judgment be, and the same hereby is, denied.

Order Accordingly.

/s/ Robert L. Taylor
United States District Judge